85-805 (1)

No. .

Supreme Court, U.S.
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In the
Supreme Court of the United States.

OCTOBER TERM, 1985.

VINCENT AND LINDA VIZBARAS,
PETITIONERS,

v.

EDWARD PRIEBER, ET AL.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Petition for Writ of Certiorari for the Petitioners, Vincent and Linda Vizbaras.

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Questions Presented for Review.

I. Whether the district court erred in instructing the jury that police officers were entitled to a defense of qualified immunity in an action under 42 U.S.C. § 1983 based upon a claim of the use of excessive force.

II. Whether the district court erred in instructing the jury that defendants could establish a qualified immunity defense based upon their reliance on the standard operating procedure of their police department in an action under 42 U.S.C. § 1983 based upon a claim of the use of excessive force.

Parties to the Proceeding.

Petitioners, who were appellants below, are Vincent Vizbaras and Linda Vizbaras.

Respondents, who were appellees below, are Edward Prieber, Leonard Zeminski, Wilbert Jones, Craig L. Dodson, John J. Hannan, William E. Daywalt, Jr., Henry McClung and David L. Griffith.

Table of Contents.

Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit 1

Opinions below 2

Jurisdiction 2

Constitutional and statutory provisions involved 3

Statement of the case 3

Reasons for granting the writ 7

I. The decision of the Court of Appeals below is in conflict with the applicable decisions of the Supreme Court 7

A. The courts below improperly afforded respondents a qualified immunity defense containing a subjective element in a case in which petitioners alleged a violation of clearly established rights 7

B. The courts below improperly permitted a qualified immunity defense to be based upon respondents' conformity with administrative practice 11

II. The decision of the Court of Appeals below is in conflict with the decisions of other circuit courts of appeals regarding the qualified immunity defense 12

Conclusion 17

Appendix follows p. 17

Table of Authorities Cited.

CASES.

Adams v. Brierton, 752 F.2d 546 (11th Cir. 1985) 16

Albers v. Whitley, 743 F.2d 1372 (9th Cir. 1984), cert. granted, 105 S.Ct. 2700 (1985) 14

Bailey v. Turner, 736 F.2d 963 (4th Cir. 1984) 13n
Bates v. Jean, 745 F.2d 1146 (7th Cir. 1984) 12
Bever v. Gilbertson, 724 F.2d 1083 (4th Cir. 1984) 14
Blackburn v. Snow, 771 F.2d 556 (1st Cir. 1985) 15
Bledsoe v. Garcia, 742 F.2d 1237 (10th Cir. 1984) 14
Briggs v. Malley, 748 F.2d 715 (1st Cir. 1984), cert. granted, 105 S.Ct. 2654 (1985) 14, 16
Capoeman v. Reed, 754 F.2d 1512 (9th Cir. 1985) 15
City of Oklahoma City v. Tuttle, 105 S.Ct. 2427 (1985) 10
Clark v. Beville, 730 F.2d 739 (11th Cir. 1984) 13
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 9
Creamer v. Porter, 754 F.2d 1311 (5th Cir. 1985) 14, 15
Davis v. Scherer, 104 S.Ct. 3012 (1984) 8, 11
Deary v. Three Un-named Police Officers, 746 F.2d 185 (3d Cir. 1984) 15
Feemster v. Dehntjer, 661 F.2d 87 (8th Cir. 1981) 10n
Floyd v. Farrell, 765 F.2d 1 (1st Cir. 1985) 16
Harlow v. Fitzgerald, 457 U.S. 800 (1982) 7, 8, 9, 10, 11 et seq.
Heller v. Bushey, 759 F.2d 1371 (9th Cir. 1985) 14
Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984) 14, 15
Jenkins v. Averett, 424 F.2d 1228 (4th Cir. 1970) 10n
Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984) 14n
Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973) 5, 10n
Joseph v. Brierton, 739 F.2d 1244 (7th Cir. 1984) 15
Kerr v. City of Chicago, 424 F.2d 1134 (7th Cir. 1970) 10n
King v. Blankenship, 636 F.2d 70 (4th Cir. 1980) 5, 10

Landrigan v. City of Warwick, 628 F.2d 736 (1st Cir. 1980) 10n

Llaguno v. Mingey, 763 F.2d 1560 (7th Cir. en banc 1985) 15

Losch v. Borough of Parkesburg, Pa., 736 F.2d 903 (3d Cir. 1984) 14, 15

McDaniel v. Carroll, 457 F.2d 968 (6th Cir. 1972) 10n

McSureley v. McClellan, 753 F.2d 88 (D.C. Cir. 1985) 15

Miranda v. Munoz, 770 F.2d 255 (1st Cir. 1985) 15

Mitchell v. Forsyth, 105 S.Ct. 2806 (1985) 8, 9

Payton v. New York, 445 U.S. 573 (1980) 15

Peraza v. Delameter, 722 F.2d 1455 (9th Cir. 1984) 14

Polite v. Diehl, 507 F.2d 119 (3d Cir. 1974) 10n

Powers v. Lightner, 752 F.2d 1251 (7th Cir. 1985) 14

Rex v. Teeples, 753 F.2d 840 (10th Cir. 1985) 15

Roberts v. Marino, 656 F.2d 1112 (5th Cir. 1981) 10n

Saldana v. Garza, 684 F.2d 1159 (5th Cir. 1982) 16

Schlothauer v. Robinson, 757 F.2d 196 (8th Cir. 1985) 15

Sec. & Law Enforcement Emp., Dist. C. 82 v. Carey, 737 F.2d 368 (2d Cir. 1984) 15

Slakan v. Porter, 737 F.2d 368 (4th Cir. 1984) 13n

Stokes v. Delcambre, 710 F.2d 1120 (5th Cir. 1983) 15

Trejo v. Perez, 693 F.2d 482 (5th Cir. 1982) 15

Tubbesing v. Arnold, 742 F.2d 401 (8th Cir. 1984) 14

United States v. Golden, 671 F.2d 369 (10th Cir. 1982) 10n

Varela v. Jones, 746 F.2d 1413 (10th Cir. 1984) 14

Vizbaras v. Prieber, 761 F.2d 1013 (4th Cir. 1985) 2

Voutour v. Vitale, 761 F.2d 812 (1st Cir. 1985) 16

Whisenant v. Yuam, 739 F.2d 160 (4th Cir. 1984) 14, 15

STATUTES.

United States Constitution
Amendment XIV 3
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1331 3
42 U.S.C. § 1983 3, 4, 5, 10n, 11 et seq.

Federal Rules of Civil Procedure
Rule 51 6n

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Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioners, Vincent and Linda Vizbaras, appellants in the court below, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on May 14, 1985. That decision affirmed the judgment of the United States District Court for the District of Maryland on December 16, 1983.

Opinions Below.

The opinion of the United States Court of the Appeals for the Fourth Circuit is published as *Vizbaras* v. *Prieber*, 761 F.2d 1013 (4th Cir. 1985), and is reproduced at page 1a in the Appendix. The memorandum of the Court of Appeals denying rehearing and en banc consideration is reproduced at page 17a of the Appendix.

The rulings of the United States District Court for the District of Maryland and the jury instructions were not published. They are reproduced beginning at page 19a of the Appendix.

Jurisdiction.

The judgment of the Court of Appeals for the Fourth Circuit was entered on May 14, 1985. The order of the Court of Appeals denying the petition for rehearing en banc was entered on August 13, 1985. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved.

United States Constitution, Amendment XIV (in pertinent part):

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 United States Code, 1983 Civil Action for Deprivation of Rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Statement of the Case.

Petitioners commenced this civil rights case on October 29, 1982 by filing an action for damages in the United States District

Court for the District of Maryland. The action was filed under 42 U.S.C. § 1983 and federal jurisdiction was invoked under 28 U.S.C. § 1331. Petitioners sought damages in connection with the death of their son, Peter Vizbaras.

Petitioners' claim was that the respondents, police officers of Anne Arundel County, had used excessive force in arresting their son, causing his death. Peter Vizbaras was killed by the respondents in his parents' home on April 17, 1982, when the officers sought to arrest him for an attempted breaking and entering at the next house.

Peter Vizbaras was a mental patient who had for some time been suffering from serious psychiatric problems. His parents informed the officers that Peter was mentally ill, but they refused the petitioners' offer to bring Peter to the station themselves.

At some point a struggle broke out and the officers attempted to subdue Peter, who resisted. Ultimately they placed him on the floor on his chest, with his hands cuffed behind him, his legs shackled together, and the handcuffs and shackles joined together with an additional pair of handcuffs. Peter was kept in this position for some time and died of positional asphyxiation in these restraints and while surrounded by police officers.

A pathologist testified that Peter's death was caused by an inability to breathe, caused by compression of his chest. In his expert opinion, death from asphyxia resulted from the method of restraint employed by the officers. The petitioners also introduced evidence from a police expert that the method of restraint employed was not a proper police practice and constituted excessive force.[1]

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[1] Petitioners testified and respondents admitted that petitioners had complained about the way the officers were treating their son at the time, had screamed for the police to stop what they were doing and had accused the police of killing their son before he died.

The case was tried between December 6 and December 8, 1983 before the Hon. Edward S. Northrop. The jury returned a verdict in favor of the respondents and judgment was entered on December 16, 1983.

The trial court had instructed the jury that the petitioners were entitled to recover if the jury found that the respondents had used more or greater force than would have appeared to a reasonable person in like circumstances to be necessary in order to accomplish any lawful purpose. In defining the concept of excessive force the trial court used the often cited language found in cases such as *King* v. *Blankenship*, 636 F.2d 70, 73 (4th Cir. 1980) and *Johnson* v. *Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973).[2]

The court also went on to instruct the jury on the qualified immunity defense. The court advised the jury that the respondents could avail themselves of the defense of good faith and that "[p]olice officers as officers of a state have a realistic good faith belief in their action, and the reasonableness of their action, if at the time of the incident, they believed their conduct to be constitionally [*sic*] permissible and that such belief is reasonable." (A. 34a.) The court also advised the jury that the defendants would have a good faith defense if their actions were justified according to the "standard operating procedures" of their department (A. 34a).

Petitioners appealed the judgment to the Fourth Circuit Court of Appeals, arguing that in a § 1983 action based on a claim of excessive force, no qualified immunity should be granted to police officers. They also argued that a qualified immunity

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[2] "You should consider in addressing this question the need for the application of force. The relationship between the need and the amount of force that was used. The extent of any physical injury which you find to have been inflicted and whether the force was applied in a good faith effort to subdue the person arrested or whether it was maliciously, wantonly and oppressively done for the purpose of inflicting injury." (A. 34a.)

defense may not be established by reliance on administrative practice or procedure.[3]

A divided panel of the court of appeals affirmed the judgment of the district court, holding that jury instructions were appropriate on the issue of qualified immunity, that a qualified immunity or good faith defense was appropriate in an excessive force case, and that the qualified immunity defense properly includes both subjective and objective elements. The decision also rejected petitioners' argument that a qualified immunity defense could not be based upon the standard operating procedures of the police department. Chief Judge Winter dissented.

Petitioners sought a rehearing and suggested that rehearing be held en banc. The court of appeals formally voted on the application, deciding six judges to five against the suggestion to hold an en banc hearing on the case. The panel denied rehearing, Chief Judge Winter dissenting.

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[3] The respondents argued in the court of appeals that petitioners had not properly preserved these arguments for review under Rule 51 of the Federal Rules of Civil Procedure. Petitioners had in fact objected to the jury instructions regarding qualified immunity and good faith (A. 20a, 21a, 22a), but they had not articulated the same argument before the district court that they made on appeal. On appeal they argued that, in any event, the improper jury instructions constituted plain error. The majority in the court of appeals agreed with the respondents that the issue had not been properly preserved, but proceeded to address the merits of petitioners' objections to the jury instructions. The majority concluded that the instructions were proper, and thus did not reach the question of whether there was plain error. Chief Judge Winter, dissenting in favor of petitioners on the issue of the qualified immunity instructions, would also have held that the appeal was proper because the instructions were plain error. As we discuss *infra*, the decisions of this Court regarding qualified immunity make clear that the jury instructions here constituted plain error. The error was extremely prejudicial to the petitioners, inasmuch as respondents' counsel had argued to the jury that whether the officers subjectively believed "they were doing the right thing" was "the most crucial aspect of this case," and that no verdict could be returned in favor of petitioners unless the jury found the respondents acted with malice.

Reasons for Granting the Writ.

I. The Decision of the Court of Appeals Below is in Conflict With the Applicable Decisions of the Supreme Court.

A. *The Courts Below Improperly Afforded Respondents a Qualified Immunity Defense Containing a Subjective Element in a Case in which Petitioners Alleged a Violation of Clearly Established Rights.*

The court of appeals approved submitting the question of a police officer's qualified immunity defense to a jury, in order for the jury to determine whether the officer held a reasonable good faith belief that his actions were lawful. This definition of the qualified immunity defense and this method for resolving whether an official is entitled to immunity has not been proper since this Court decided *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). There this Court substantially redefined the qualified immunity defense to eliminate any consideration of an official's subjective state of mind regarding the legality of his conduct.[4]

In *Harlow*, this Court defined the qualified immunity defense as follows:

> [G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate

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[4] The official's subjective awareness of whether his conduct was lawful may still arise in extraordinary circumstances where he alleges that his failure to know clearly established law was justifiable. *Harlow* v. *Fitzgerald*, *supra* at 819. This case did not present any claim by the respondents that they would have been justified in failing to know that the use of excessive force would violate the constitutional rights of the deceased Peter Vizbaras.

> clearly established statutory or constitutional rights of which a reasonable person would have known.

Id., at 818. *Harlow* made clear that the question is whether an individual's conduct is objectively reasonable, "as measured by reference to clearly established law." *Id.*, at 818.

Where a defendant cannot show that the constitutional rights a plaintiff claims were violated were not clearly established, *Harlow* emphasized that a civil rights plaintiff is entitled to be compensated for any violation of his rights:

> The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.

Id., at 819.

In *Davis* v. *Scherer*, 104 S.Ct. 3012 (1984), this Court left no doubt about the impact of *Harlow* on the qualified immunity defense. The Court made it clear that the "totality of the circumstances" test of previous cases which had comprised inquiries into both the objective reasonableness of the defendant official's conduct and the official's subjective state of mind had been replaced by the new *Harlow* formulation. The Court noted that *Harlow* had "rejected the inquiry into state of mind in favor of a wholly objective standard." *Id.*, at 3018.

This view of the qualified immunity defense was underscored in this Court's recent decision in *Mitchell* v. *Forsyth*,

105 S.Ct. 2806 (1985). In analyzing the nature of a trial court's pre-trial decision on a summary judgment motion seeking qualified immunity, the Court held:

> All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.

Id., at 2816.

It is clear from *Mitchell* v. *Forsyth* that whether qualified immunity is available must be decided by the court, and that this issue is separate from those questions which are to be determined at trial by the jury. The Court held:

> [I]t follows from the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated.

Id., at 2816. In holding that pre-trial decisions on qualified immunity questions are "conclusive" under *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the Court relied

on the logical outcome of *Harlow* that the qualified immunity question is not one which should be submitted to the jury.[5]

The decision in *Harlow* thus modified the nature of the qualified immunity defense in excessive force cases. *See, City of Oklahoma City* v. *Tuttle*, 105 S.Ct. 2427, 2430 n.1 (1985). Prior to the death of Peter Vizbaras it was clearly established law that the use of excessive force does violate a person's constitutional rights.[6] This principle was particularly clear in the Fourth Circuit as a result of the decision in *King* v. *Blankenship, supra*, at 72:

> Lest there be doubt as to the rule in this circuit, we specifically hold that the unjustified striking, beating, or infliction of bodily harm upon a prisoner gives rise to liability under 42 U.S.C. § 1983 on the part of one who, acting under color of state law, engages in such conduct without just cause.

In such cases the jury question is whether there was just cause for the force used, not whether an officer is cloaked with

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[5] A jury may, of course, have to determine what happened in a particular case where the facts are in dispute. However, where the court has made or should have made the decision at a pre-trial proceeding that if plaintiff's version of the facts is believed the defendant would not be entitled to qualified immunity because plaintiff's rights were clearly established, there will be no further qualified immunity issue which must be submitted to the jury.

[6] *See*, e.g., *Landrigan* v. *City of Warwick*, 628 F.2d 736 (1st Cir. 1980); *Johnson* v. *Glick, supra*; *Polite* v. *Diehl*, 507 F.2d 119 (3d Cir. 1974); *Jenkins* v. *Averett*, 424 F.2d 1228 (4th Cir. 1970); *Roberts* v. *Marino*, 656 F.2d 1112 (5th Cir. 1981); *McDaniel* v. *Carroll*, 457 F.2d 968 (6th Cir. 1972); *Kerr* v. *City of Chicago*, 424 F.2d 1134 (7th Cir. 1970); *Feemster* v. *Dehntjer*, 661 F.2d 87 (8th Cir. 1981); *United States* v. *Golden*, 671 F.2d 369 (10th Cir. 1982). While there may be some disagreement as to the extent of force necessary to raise a constitutional issue, the extreme measures applied here, and the resultant death, plainly raised an appropriate issue under § 1983.

immunity because of a lack of clarity as to the legal or constitutional rules which governed his conduct.

B. *The Courts Below Improperly Permitted a Qualified Immunity Defense to be Based Upon Respondents' Conformity with Administrative Practice.*

It is equally clear that the district court's jury instruction permitting the qualified immunity defense to be established by conformity with the standard operating procedure of the defendants' police department conflicts with the decisions of this Court. The question of whether a defendant's conduct is in accord with or violates administrative procedures is not material to the establishment of a qualified immunity defense.

In *Davis* v. *Scherer, supra*, this Court held that the violation of administrative regulations was irrelevant to whether defendants in a § 1983 case were entitled to qualified immunity. In that case plaintiff proved that defendants violated state administrative regulations by denying him a hearing in connection with a personnel action. The Court held that the only issue with regard to the qualified immunity defense after *Harlow* was whether plaintiff's right to a hearing was clearly established at the time of the incident as a matter of constitutional law. Violation of the administrative regulations was held to be of no moment in determining whether the defendants' conduct conformed to a standard of "objective legal reasonableness."

By the same token, even if the respondents' conduct in this case was in accord with the standard operating procedure of the police department, if the force used was unreasonable and excessive under constitutional standards plaintiffs were entitled to compensation. It cannot establish a defense to liability for the respondents to show that the violation took place pursuant to policies of the department.

II. The Decision of the Court of Appeals Below is in Conflict with the Decisions of Other Circuit Courts of Appeals Regarding the Qualified Immunity Defense.

There is substantial conflict among the courts of appeals regarding the application of the qualified immunity defense in police misconduct cases under § 1983. If certiorari were to be granted in the instant case a number of the significant issues which now divide the lower federal courts could be resolved. The current confusion as to when qualified immunity will protect officials from liability in damages creates uncertainties for officials and, at the same time, makes resolution of such cases difficult for both plaintiffs and defendants.

The court below held that it is appropriate to instruct the jury in a § 1983 case that defendants charged with using excessive force are not liable if they have established a good faith or qualified immunity defense. This decision is in clear conflict with the holding of the Seventh Circuit Court of Appeals that officials are not protected by qualified immunity for the use of excessive force which violates the rights of prisoners. In *Bates* v. *Jean*, 745 F.2d 1146, 1152 (7th Cir. 1984), the court declared:

> [Defendant] would have a qualified immunity defense if he could demonstrate that at the time of the alleged incident he could not have known that the Constitution prohibited the intentional infliction of 'excessive or grossly severe punishment' on prisoners. Because the law proscribing abuse of prisoners was clearly established as of that date, following the dictates of *Harlow* v. *Fitzgerald* . . . we hold that [defendant] will not have this qualified immunity defense available to him.

The Eleventh Circuit has also recognized that a qualified immunity instruction is not appropriate in an excessive force case because "it is clearly established that a police officer may not apply undue force in effecting an arrest." *Clark* v. *Beville*, 730 F.2d 739, 740 (11th Cir. 1984).[7]

In contrast to the Fourth Circuit here, the Seventh Circuit in *Bates* v. *Jean*, *supra*, at 1151, noted that subjective considerations of "good faith" have no bearing on the availability of the qualified immunity defense:

> As is the common practice, the district court referred to qualified immunity as 'good faith immunity,' but, as this case illustrates, that label can lead to confusion because it incorrectly implies that subjective factors are important. In *Harlow* v. *Fitzgerald* . . . the Supreme Court rejected any inquiry into an official's state of mind in favor of a wholly objective immunity standard.

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[7] Strikingly, there are conflicting decisions on this issue from different panels within the Fourth Circuit itself. In *Slakan* v. *Porter*, 737 F.2d 368 (4th Cir. 1984), the court held that qualified immunity did not protect officials in a case alleging the use of excessive force in prison:

> The officials involved in the present case had explicit legal guideposts to follow in discharging their duties. At the time of Slakan's beating, the eighth amendment unquestionably protected inmates from the unjustified and excessive use of force by prison officials.

Id., at 376-377. The court rejected the qualified immunity defense in *Slakan* v. *Porter*, even though it recognized that the use of the implements of force involved in that case by prison guards was not unlawful *per se*. *Id.*, at 377. However, in an obvious contradiction, in *Bailey* v. *Turner*, 736 F.2d 963 (4th Cir. 1984), the Fourth Circuit had held that jury instructions on the qualified immunity defense were appropriate in a case involving the macing of a prisoner, justifying the defense on the ground that the use of mace is not *per se* unconstitutional.

The decision of the court below that the qualified immunity defense continues to have a subjective element even after this Court's decision in *Harlow* is in clear conflict with the weight of authority from other circuits which have correctly interpreted *Harlow* as limiting the qualified immunity defense to an objective test. *Hobson* v. *Wilson*, 737 F.2d 1 (D.C. Cir. 1984); *Briggs* v. *Malley*, 748 F.2d 715 (1st Cir. 1984), cert. granted, 105 S.Ct. 2654 (1985); *Losch* v. *Borough of Parkesburg, Pa.*, 736 F.2d 903, 909 (3d Cir. 1984); *Creamer* v. *Porter*, 754 F.2d 1311, 1317 (5th Cir. 1985); *Powers* v. *Lightner*, 752 F.2d 1251 (7th Cir. 1985); *Tubbesing* v. *Arnold*, 742 F.2d 401, 405 (8th Cir. 1984).[8]

There are other cases holding that qualified immunity is available to defendants in excessive force cases, but in none of them have the courts fully analyzed the impact of *Harlow* on the qualified immunity defense. *See*, e.g., *Bledsoe* v. *Garcia*, 742 F.2d 1237 (10th Cir. 1984); *Varela* v. *Jones*, 746 F.2d 1413 (10th Cir. 1984); *Heller* v. *Bushey*, 759 F.2d 1371 (9th Cir. 1985); *Peraza* v. *Delameter*, 722 F.2d 1455 (9th Cir. 1984). *Cf.*, *Albers* v. *Whitley*, 743 F.2d 1372 (9th Cir. 1984), cert. granted, 105 S.Ct. 2700 (1985).

The confusion with regard to whether officials charged with using excessive force are entitled to qualified immunity is part of a large pattern of conflict and confusion in the cases interpreting *Harlow* v. *Fitzgerald*, *supra*. Most courts have looked to the constitutional rights which a plaintiff alleges were violated and if those rights were clearly established have denied any qualified immunity defense. Thus, in a wide variety of situations courts have held that the constitutional rights plaintiffs claimed were violated were so clearly established that the

[8] Indeed, there are also decisions from the Fourth Circuit which recognize this point. *Bever* v. *Gilbertson*, 724 F.2d 1083 (4th Cir. 1984); *Whisenant* v. *Yuam*, 739 F.2d 160 (4th Cir. 1984); *Jensen* v. *Conrad*, 747 F.2d 185 (4th Cir. 1984).

defendant officials were not entitled to qualified immunity. *See*, e.g., *Deary* v. *Three Un-named Police Officers*, 746 F.2d 185 (3d Cir. 1984) (probable cause required for arrest); *Trejo* v. *Perez*, 693 F.2d 482 (5th Cir. 1982) (same); *Llaguno* v. *Mingey*, 763 F.2d 1560, 1569 (7th Cir. en banc 1985) (same); *Miranda* v. *Munoz*, 770 F.2d 255 (1st Cir. 1985) (medical care for prisoners); *Whisenant* v. *Yuam*, *supra* (same); *Joseph* v. *Briert...*, 739 F.2d 1244 (7th Cir. 1984) (same); *Hobson* v. *Wilson*, *supra* (First Amendment violation); *Losch* v. *Borough of Parkesburg, Pa.*, *supra* (First Amendment violation and retaliatory prosecution); *Rex* v. *Teeples*, 753 F.2d 840 (10th Cir. 1985) (coerced confession); *Blackburn* v. *Snow*, 771 F.2d 556 (1st Cir. 1985) (strip search of prison visitor); *Creamer* v. *Porter*, *supra* (seizure of items not named in warrant); *Stokes* v. *Delcambre*, 710 F.2d 1120 (5th Cir. 1983) (failure to protect prisoner). In other cases courts have correctly applied an objective test and afforded defendants qualified immunity because the constitutional rights at stake were not clearly established. *See*, e.g., *Schlothauer* v. *Robinson*, 757 F.2d 196 (8th Cir. 1985) (warrantless arrest in home prior to *Payton* v. *New York*, 445 U.S. 573 (1980)); *Sec. & Law Enforcement Emp., Dist. C. 82* v. *Carey*, 737 F.2d 187 (2d Cir. 1984) (strip search); *Capoeman* v. *Reed*, 754 F.2d 1512 (9th Cir. 1985) (prison regulations re: haircutting); *McSurely* v. *McClellan*, 753 F.2d 88 (D.C. Cir. 1985) (use of documents seized in state search by Senate investigator).

A good analysis of the impact of *Harlow* on many police misconduct cases was given by Judge Posner in *Llaguno* v. *Mingey*, *supra*, at 1569 in the context of a false arrest case:

> The issue of immunity as redefined in *Harlow* is whether when the defendant violated the plaintiff's rights the law appeared to authorize the defendant's misconduct. This is an issue of law, for the judge

> to decide. What the defendant believed, an issue of fact, is neither here nor there. The good sense of *Harlow* in withdrawing the issue of immunity from the jury is particularly evident in a case such as this where the police are charged with having acted without probable cause. The question whether they had probable cause depends on what they reasonably believed with reference to the facts that confronted them, as the judge instructed in the passage we quoted earlier. To go on and instruct the jury further that even if the police acted without probable cause they should be exonerated if they reasonably (though erroneously) believed that they were acting reasonably is to confuse the jury and give the defendants two bites at the apple.

Other courts, however, have held that qualified immunity is available to officers when making an arrest, even if they acted in the absence of the clearly established requirement of probable cause. *See, Floyd* v. *Farrell,* 765 F.2d 1 (1st Cir. 1985) (warrantless arrest); *Briggs* v. *Malley, supra* (arrest with warrant); *Saldana* v. *Garza,* 684 F.2d 1159 (5th Cir. 1982). Other misapplications of qualified immunity are not uncommon. For example, in some instances courts have confused qualified immunity determinations with decisions about causation, *see, Voutour* v. *Vitale,* 761 F.2d 812, 819 (1st Cir. 1985), or with questions of a defendant's motivations, *see, Adams* v. *Brierton,* 752 F.2d 546 (11th Cir. 1985).

As the citations in this petition indicate, qualified immunity issues are litigated in a very high volume of police misconduct cases filed under § 1983. This Court should grant certiorari in this case to resolve the conflict and confusion which now makes litigation of these matters unnecessarily uncertain.

Conclusion.

For the foregoing reasons, it is respectfully requested that this Honorable Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Table of Contents.

Decision of Fourth Circuit Court of Appeals, *Vizbaras* v. *Prieber*, 761 F.2d 1013 (4th Cir. 1985) 1a

Memorandum Order of Court of Appeals, denying rehearing and en banc consideration 17a

Partial Transcript of Colloquy re: Jury Instructions by District Court, December 9, 1983 19a

Jury Instructions by District Court, December 9, 1983 23a

Appendix.

Vincent VIZBARAS, Individually and as Personal Representative of the Estate of Peter Vizbaras, deceased, Appellant,

and

Linda Vizbaras,* Individually and as Personal Representative of the Estate of Peter Vizbaras, deceased, Plaintiff,

v.

Lieutenant Edward PRIEBER, Anne Arundel County Police; Officer Edward Zeminsky, Anne Arundel County Police; Officer Wilbert Jones, Anne Arundel County Police; Officer Craig L. Dodson, Anne Arundel County Police; Sergeant John J. Hannan, Anne Arundel County Police; Officer William E. Daywalt, Jr., Anne Arundel County Police; Officer Henry McClung, Anne Arundel County Police; Officer David L. Griffith, Anne Arundel County Police, Appellees.

No. 84-1073.

United States Court of Appeals,
Fourth Circuit.

Argued Feb. 5, 1985.
Decided May 14, 1985.

Civil rights action was brought against county and various police officers seeking damages arising out of the death of

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* Only Vincent Vizbaras signed the appeal. Linda Vizbaras is a plaintiff and has throughout this opinion been included with her husband as an appellant. Technically, Vincent Vizbaras is the sole appellant.

plaintiff's son which occurred following his arrest. The United States District Court for the District of Maryland, Edward S. Northrop, Senior District Judge, dismissed the action against the county, granted a directed verdict in favor of defendants as to the unlawful entry and illegal arrest claims and entered judgment on jury's verdict in favor of defendants on plaintiffs' claim of excessive force, and plaintiffs appealed. The Court of Appeals, K.K. Hall, Circuit Judge, held that: (1) it was for jury to determine whether restraint used by police officers on victim constituted excessive force and therefore trial court did not err in instructing jury on good-faith immunity defense; (2) trial court did not improperly include subjective elements in instructing jury on defense of good-faith immunity; and (3) where plaintiffs did not offer any evidence of other alleged incidents involving use of excessive force by county police officers, county could not be held liable under Section 1983.

Affirmed.

Harrison L. Winter, Chief Judge, filed concurring and dissenting opinion.

Michael Avery, Boston, Mass. (Avery & Friedman, Boston, Mass., Michael O'Reilly, Rees, Broome & Diaz, Vienna, Va., on brief), for appellants.

David S. Bliden, Deputy County Sol., Annapolis, Md. (Stephen R. Beard, County Sol., James S. Gibbons, Asst. County Sol., Annapolis, Md., on brief), for appellees.

Before WINTER, Chief Judge, HALL, Circuit Judge, and MACKENZIE, Chief District Judge, United States District Court for the Eastern District of Virginia, sitting by designation.

K.K. HALL, Circuit Judge:

Vincent and Linda Vizbaras (the Vizbarases) appeal from the district court's entry of judgment on the jury's verdict in

favor of defendants on plaintiffs' 42 U.S.C. § 1983 claim of excessive force. They also appeal from the district court's order dismissing their § 1983 action against Anne Arundel County, Maryland, (the "County"), and the district court's grant of a directed verdict as to their unlawful entry and illegal arrest claims. We affirm.

I.

On April 17, 1982, Anne Arundel County Police Officers Craig L. Dodson, Leonard Zeminsky, Wilbert Jones, Lieutenant Edward Prieber, and another officer investigated a complaint of an attempted breaking and entering at the home of Voldemar Einberg. Einberg informed the officers that his neighbor, Peter Vizbaras, had been trying to break into his house. Einberg told the officers that, in trying to get in, Peter had broken a window and kicked in Einberg's door. The officers noticed some broken glass and a substance which appeared to be blood at Einberg's door. They learned that Peter had assaulted Einberg on a prior occasion and that Peter had also previously beaten another neighbor. Lieutenant Prieber advised the officers to go next-door to the Vizbarases' and arrest Peter for burglary.

Officers Dodson, Zeminsky, and Jones went to the Vizbaras home, where Vincent Vizbaras, Peter's father, answered the door. The officers informed Mr. Vizbaras that they wanted to question Peter about the incident at Einberg's and Mr. Vizbaras invited the police officers inside. After the officers were in the house, Peter came downstairs from the second floor. The officers noticed that his foot was bandaged and bleeding. Officer Dodson informed Peter that he was a suspect in the breaking and entering and that he would have to go to the police station. Peter refused to go with the police officers, asked

them to leave, and went back upstairs. Afterwards Peter returned downstairs, and the officers insisted that he accompany them to the police station. The Vizbarases asked the officers to leave, and the officers refused. The Vizbarases explained to the officers that Peter was mentally ill, and they offered to take him to the station themselves.

A skirmish subsequently arose in which the police officers seized Peter, trying to subdue him. It took all three officers to wrestle Peter, who was six feet three inches tall and weighed 278 pounds, to the floor. According to the police officers, it took them five minutes to get Peter in handcuffs, after which he kicked violently, and they had a hard time holding him down. Officer Dodson used the radio to call for help. Four additional officers responded to the call for assistance.

In addition to handcuffing Peter, who was lying with his chest on the floor, the officers placed two pairs of nylon cuffs on Peter's ankles in order to restrain him from kicking. Peter broke the nylon cuffs, so the officers secured leg shackles between his ankles. In order to prevent Peter from kicking his feet up and down and sideways, the officers used two sets of handcuffs to connect the chain on the leg shackles to the chain on the handcuffs on Peter's wrists, resulting in a "cradle cuff." In this position, Peter's chest was on the floor, his hands cuffed behind him, with the leg shackles and handcuffs joined so that his legs were at a forty to forty-five degree angle from the floor.

After being cradle cuffed, Peter continued to kick, alternating between going into a rage and being calm. In his quiet periods, Peter moved his head from side to side and conversed with his parents. During one of the calm periods, the officers noticed that Peter had stopped breathing, and they immediately tried to resuscitate him. Their efforts proved to be of no avail, and Peter died of positional asphyxiation as a result of his inability to breathe.

On October 29, 1982, the Vizbarases filed this civil rights action against Maxwell Frye, Chief of the County Police Department, Lieutenant Prieber, and Officers Zeminsky, Jones, and Dodson, alleging, *inter alia*, that the officers had unconstitutionally entered their home and arrested their son, and that the officers had killed their son by using unreasonable and excessive force while arresting him, in violation of 42 U.S.C. § 1983. The Vizbarases joined the County as a defendant and amended their complaint to include additional police officers as defendants.

The district court subsequently dismissed the actions against the County and Chief Frye. The case with respect to the remaining defendants was tried to a jury. At the close of the Vizbarases' case, the district court directed a verdict for the defendants on the Vizbarases' claims that the police officers unconstitutionally entered their home and arrested their son.

With respect to the claim of excessive force, following the introduction of all the evidence, the district court charged the jury, *inter alia*, on the affirmative defense of qualified immunity which had been raised by the defendants. The district court instructed the jury as follows:

> The defendants in this case may avail themselves of the defense of good faith. Police officers as officers of a state have a realistic good faith belief in their action, and the reasonableness of their action, if at the time of the incident, they believe their conduct to be constitionally [sic] permissible and that such belief is reasonable. Police officers also have a good faith reliance on standard operating procedures, if at the time of the incident they relied on the standard operating procedures of their institution when responding to an incident and when such reliance is honest and in its intention and reasonable.

Subsequently, the district court further charged that:

> A defendant may not avail himself of the [qualified immunity] defense until he has proved that he has a good faith belief in the legality of what he did. The defendant is not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the action he took within the sphere of official responsibility would violate the constitutional rights of the person affected. The defendant must prove that he believed in good faith that his conduct was lawful, and that his belief itself was reasonable.
>
> The defendant is not entitled to good faith defense if he acted with malicious intent to violate the plaintiff's constitutional right or cause other injury to the plaintiff or if the defendant knew or should have known that his action would violate the plaintiff's constitutional rights.

The jury found for the defendants. This appeal followed.

II.

On appeal, the Vizbarases contend that the district court erred in charging the jury on the defense of "good faith" or qualified immunity and in permitting the defendants to introduce evidence of their good faith reliance upon the standard operating procedures of their police department.* Appellants

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* With respect to the qualified immunity issues, the defendants contend that the Vizbarases did not preserve these claims for review. Although the Vizbarases did state a general objection "to immunity," with respect to the qualified immunity instruction, they did not state their grounds for objecting, as required by Fed.R.Civ.P. 51. Additionally, the Vizbarases objected to the introduction of evidence concerning the police department's procedures. However, this

further argue that the district court erred in dismissing their claims against Anne Arundel County; and that the district court erred in directing a verdict for defendants on the illegal entry and unlawful arrest claims. We disagree.

[1, 2] Relying upon *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the Vizbarases maintain that the district court erred in affording the officers the defense of qualified immunity. They quote *Harlow* for the proposition that "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Id.* at 818-19, 102 S.Ct. at 2738-39. The Vizbarases maintain that since the law at the time of this incident was that police officers could not use unreasonable and excessive force in making an arrest, the jury should not have been instructed on the qualified immunity defense. The use of force, however, is not *per se* unconstitutional. We conclude that, under the facts of this case, it was for the jury to determine whether the restraint used by the police officers constituted excessive force. Therefore, we hold that the district court did not err in instructing the jury on the good faith immunity defense. *Cf. Bailey v. Turner*, 736 F.2d 963 (4th Cir. 1984) (use of mace on prisoner not *per se* unconstitutional so as to require denial of good faith immunity defense). Likewise, we reject the Vizbarases' claim that the district court erred in allowing the officers to introduce evidence of their good faith reliance upon standard police department operating procedures.

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objection was made on the ground that there had been "no evidence of standard operating procedures," and not on the ground that such a defense was improper, as is now asserted. Therefore, we agree with the defendants that these issues were not properly preserved for review. Nevertheless, we will consider these issues in order to determine whether there was any fundamental error, as alleged by the Vizbarases.

[3] The Vizbarases further rely upon *Harlow* in their assertion that the district court erred by including subjective factors in defining the qualified immuinity defense. We rejected a similar argument in *McElveen v. County of Prince William*, 725 F.2d 954 (4th Cir.), *cert. denied*, — U.S. —, 105 S.Ct. 88, 83 L.Ed.2d 35 (1984). In *McElveen*, we held that "[a]lthough the *Harlow* Court indicated that the good-faith defense turns *primarily* on objective factors, it did not hold that an *exclusively* objective standard was to be applied to claims that proceed to trial. Thus, the County's argument that the standard for good-faith immunity must be purely objective, is untenable. . . ." *Id.* at 957-58 (citations omitted). Our reading of the instructions at issue in this case leads us to conclude, as we did in *McElveen*, that "[t]he good-faith standard employed by the district judge . . . included both the subjective element of good faith 'belief,' and the objective element of 'reasonableness' for that belief." *Id.* at 956 (footnote omitted). Therefore, the Vizbarases' contention that the district court improperly included subjective elements in instructing the jury on the defense of good faith immunity must fail.

III.

The Vizbarases further allege that the district court erred in dismissing their claims against the County. They contend that because the County was dismissed early in the litigation, they were unable to conduct sufficient discovery to prepare a case against the County. This claim is meritless.

[4] At the hearing on the County's motion to dismiss or, in the alternative, for summary judgment, the Vizbarases neither offered any evidence to support their claim that the County had a custom and history of using excessive force, nor did they make any request that they be allowed to undertake further

discovery. We held in *Wellington v. Daniels*, 717 F.2d 932 (4th Cir. 1983), that "[a] single act or isolated incidents are normally insufficient to establish supervisory inaction upon which to predicate § 1983 liability." *Id.* at 936. As the Vizbarases did not offer any evidence of other alleged incidents involving the use of excessive force by the County police officers, we hold that the district court did not err in dismissing the Vizbarases' claim against the County.

IV.

Finally, the Vizbarases argue that the district court erred in directing a verdict on their claims that the officers had unconstitutionally entered their home and arrested their son without a warrant. According to appellants, the officers did not indicate that they intended to arrest Peter. Thus, appellants maintain that the officers gained entry only because they deceptively described their purpose to Vincent Vizbaras, and that the officers' deception nullified Mr. Vizbaras' consent.

[5] In *United States v. Briley*, 726 F.2d 1301 (8th Cir. 1984), a third-party consent to a warrantless entry was made in response to an officer's representation that he wished to speak to the defendant about an important matter. *Id.* at 1303. The Eighth Circuit held this consent to be valid and, in so doing, noted that there was no deceitful misrepresentation even though the officers ultimately arrested the defendant. Similarly, we find that in this case the officers' explanation as to why they were present at the Vizbaras house was not a misrepresentation, much less an intentional one. Nor is there any evidence that the officers' statements to Mr. Vizbaras caused him any duress or coerced him into permitting them entry into the house. Therefore, we conclude that the district court did not err in finding that Mr. Vizbaras consented to the police officers' entering his home.

[6] We further find that the Vizbarases' contention that the officers unconstitutionally arrested their son is without merit. Once the officers were inside the house, they had a right to arrest Peter because they had probable cause to believe that he had been involved in an attempted breaking and entering. Accordingly, we hold that the district court did not err in directing a verdict for the officers with respect to the Vizbarases' claims of illegal entry and unlawful arrest.

V.

On the basis of the foregoing, the judgment of the district court is affirmed.

AFFIRMED.

WINTER, Chief Judge, concurring and dissenting:

I agree that the district court correctly dismissed plaintiffs' claim against Anne Arundel County, and to that extent I concur in the majority opinion. But I think that the district court committed plain error in instructing the jury that the individual defendants could avail themselves of the defense of good faith. Further, I think that even if the qualified or good faith immunity defense were available, the district court committed plain error in misstating the law governing the defense. Finally, I think that the district court erred in directing a verdict for defendants on plaintiffs' claim that their rights were violated by the entry into their home and that their deceased son's rights were violated by an unlawful arrest. I respectfully dissent. Except with respect to the County, I would reverse and grant a new trial.

I.

The jury was instructed correctly, albeit redundantly, that plaintiffs were entitled to recover on their claim under 42 U.S.C.

§ 1983 if the jury found that the police officers in arresting the deceased had used "more or greater force or means on the decedent, Peter Vizbaras, than would have appeared to a reasonable person in like circumstances to be necessary in order to accomplish any lawful purpose or purposes intended." But then the jury was instructed, as quoted in the majority opinion, that "defendants . . . may avail themselves of the defense of good faith" and that "[p]olice officers as officers of a state have a realistic good faith belief in their action, and the reasonableness of their action, if at the time of the incident, they believe their conduct to be constitionally [sic] permissible and that such belief is reasonable." Finally, in the course of instructing the jury with regard to plaintiffs' negligence claim, the district court again adverted to plaintiffs' § 1983 cause of action saying that

> [t]he defendant is not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the action he took within the sphere of official responsibility would violate the constitutional rights of the person affected. The defendant must prove that he believed in good faith that his conduct was lawful, and that his belief itself was reasonable.

I perceive two reversible errors in these instructions. First, I think that the district court should not have submitted the issue of qualified immunity to the jury. Second, even if submitted, the district court's formulation of the doctrine was legally incorrect.[1]

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[1] As the majority points out, it is debatable if plaintiffs unequivocally preserved these issues for review. The point need not long detain us because the errors were so fundamental that they constitute "plain error." Fed.R.Civ.P. 51; *Miller v. Premier Corp.*, 608 F.2d 973, 983 (4 Cir. 1979). In this, essentially a wrongful death claim, if the jury were incorrectly instructed as to how to return

II.

The controlling authority on application of the doctrine of qualified immunity is *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). There the Supreme Court unequivocally said that "[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Id.* at 818-19, 102 S.Ct. at 2738-39.[2] In my view, the law on April 17, 1982, the date of the decedent's arrest and tragic death, was and still is "clearly established" that police officers may not subject a person to unreasonable and excessive force measured by an objective standard when taking him into custody. *King v. Blankenship*, 636 F.2d 70 (4 Cir. 1980); *Ridley v. Leavitt*, 631 F.2d 358 (4 Cir. 1980); *Jenkins v. Averett*, 424 F.2d 1228 (4 Cir. 1970). Thus the only issue to be submitted to the jury, as the jury was initially correctly instructed, was whether "more or greater force" was applied to the decedent in effecting his arrest "than would have appeared to a reasonable person in like circumstances to be necessary in order to accomplish any lawful purpose or purposes intended."[3] Defendants' good faith belief, measured

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a verdict, I would think that to ignore the error "would result in a denial of fundamental justice" and therefore the error should be corrected. *See Furka v. Great Lakes Dredge & Dock Co.*, 755 F.2d 1085, 1089 (4 Cir. 1985).

[2] *Harlow* does recognize that a defendant is entitled to immunity if he shows that he reasonably should be excused from knowing the law. This aspect of *Harlow* is irrelevant here because defendants make no claim that there were reasons for them not to know the law.

[3] I emphatically reject the majority's reasoning that since the use of force is not *per se* unconstitutional and that an objectively reasonable amount of force necessary to accomplish the arrest could lawfully be employed, it follows that, in determining whether the police used excessive force, the jury properly could consider good faith immunity. The majority apparently reasons that because neither we nor the Supreme Court has specified the exact quantum of force

objectively or subjectively, was not an issue. Therefore I am impelled to conclude that the jury was misled as to the proper basis on which to decide the case and its verdict for defendants and the judgment entered thereon should not be permitted to stand.[4]

I agree with plaintiffs that even if a qualified immunity defense instruction were proper, the district court misstated the applicable law by improperly introducing a subjective test. Except for *McElveen v. County of Prince William*, 725 F.2d 954 (4 Cir.), *cert. denied*, ____ U.S. ____, 105 S.Ct. 88, 83 L.Ed.2d 35 (1984), we have consistently read *Harlow* as eliminating the subjective element from the defense, and we have focused instead on whether the challenged conduct violated clearly established rights. *See Jensen v. Conrad*, 747 F.2d 185, 195 n.13 (4 Cir. 1984); *Whisenant v. Yuam*, 739 F.2d 160, 165 (4 Cir. 1984); *Slakan v. Porter*, 737 F.2d 368, 376-77 (4 Cir. 1984).

While *McElveen* read *Harlow* as placing primary emphasis on objective factors, it read it "not [to] hold that an *exclusively* objective standard was to be applied to claims that proceeded to trial." 725 F.2d at 958 (emphasis in original). *McElveen* was decided January 26, 1984, and to the extent that it read *Harlow* to preserve consideration of a subjective element as part of the qualified immunity defense, its holding was dis-

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that constitutes excessive force, the law was not "clearly established," and the qualified immunity defense was properly available. Yet many, perhaps most, constitutional deprivations involve questions of degree where the precise contours of the constitutional protections have not been drawn. The majority would therefore render *Harlow* a virtual nullity and mistakenly "turn qualified into absolute immunity by requiring immunity in any new fact situation." *Hobson v. Wilson*, 737 F.2d 1, 26 (D.C. Cir. 1984).

[4] I agree with the majority that evidence of standard police department operating procedures was admissible, but only as a guide to the jury as to what is reasonable under given circumstances, and not to establish defendants' good faith.

placed on June 28, 1984 by the decision in *Davis v. Scherer*, ____ U.S. ____, 104 S.Ct. 3012, 82 L.Ed. 2d 139 (1984). *Davis* characterized *Harlow* as follows:

> *Harlow v. Fitzgerald*, supra, *rejected the inquiry into state of mind in favor of a wholly objective standard*. Under Harlow, officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 US, at 818, 73 L Ed 2d 396, 102 S Ct. 2727 [at 2738]. Whether an official may prevail in his qualified immunity defense depends upon the "objective reasonableness of [his] conduct as measured by reference to clearly established law." Id. (footnote deleted). *No other "circumstances" are relevant to the issue of qualified immunity*.

____ U.S. at ____, 104 S.Ct. at 3018, 82 L.Ed.2d at 147. (emphasis added). Thus it was "plain error" on the part of the district court to instruct the jury that the police officers' "realistic good faith" or their "good faith" beliefs were elements to be considered in whether to afford them qualified immunity. Even if qualified immunity is an element of the case, plaintiffs are entitled to a new trial because of this erroneous instruction.

III.

To my mind, the district court committed a third reversible error when it directed a verdict for defendants on plaintiffs' claim that their rights were violated by defendants' entry into plaintiffs' home without an arrest or search warrant and that their son's rights were violated by an unlawful arrest.

Although lacking a warrant, defendants clearly had probable cause to arrest plaintiffs' son. They could have arrested him anywhere outside of his home, but absent a warrant or valid consent, they could not have arrested him in his home. *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). Further, consent, if relied on to validate the arrest, must be freely and voluntarily given. *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 1791, 20 L.Ed.2d 797 (1968). If consent is obtained by coercion or misrepresentation, it is not freely and voluntarily given. *United States v. Tweel*, 550 F.2d 297 (5 Cir. 1977).

As I read the record, there is evidence that defendants told plaintiffs that they wished to talk to the son about his involvement in the attempted breaking and entering, and though they intended to arrest the son, defendants did not communicate this intention to his parents. Further, the decedent's father testified that when defendants announced their intention to arrest his son, he ordered them to leave his house and to leave his son alone if they did not have an arrest warrant.

While I agree that there was consent to enter the house, I think that there was a jury question as to whether the consent was limited to questioning and did not include the arrest, *cf. Mason v. Pulliam*, 557 F.2d 426 (5 Cir. 1977); *United States v. Dichiarinte*, 445 F.2d 126 (7 Cir. 1971), whether consent to arrest was obtained deceptively and hence not voluntarily given, *cf. Schneckloth v. Butstamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *United States v. Phillips*, 497 F.2d 1131, 1135 (9 Cir. 1974); *Alexander v. United States*, 390 F.2d 101 (5 Cir. 1958), or whether, if consent to arrest was voluntarily given, it was withdrawn before the arrest was made, *cf. United States v. Ward*, 576 F.2d 243 (9 Cir. 1978); *Mason v. Pulliam*, 557 F.2d at 429. A verdict for defendants should not have been directed.

To summarize, I would affirm the judgment for Anne Arundel County and reverse the judgment for the other defendants, awarding plaintiffs a new trial to be conducted in conformity with the views I have expressed.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1073

FILED
AUG 13 1985
U.S. Court of Appeals Fourth Circuit

Vincent Vizbaras, etc.,

Appellant,

and

Linda Vizbaras, etc.,

Plaintiff,

versus

Lieutenant Edward Prieber, etc., et al,

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Edward S. Northrop, District Judge.

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. In a requested poll of the Court, Judges Winter, Phillips, Murnaghan, Sprouse and Ervin voted to rehear the case in banc; and Judges Russell, Widener, Hall, Chapman, Wilkinson and Sneeden voted against rehearing the case in banc. As a majority of the judges voted to deny rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Winter for a panel consisting of Judge Winter, Judge Hall and Judge MacKenzie, United States District Judge, sitting by designation. Judge Winter dissents.

For the Court,

JOHN M. GREACEN
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

VOLUME IV

VINCENT VIZBARAS etc.,
Plaintiffs
vs.
LT. EDWARD PRIEBER, et al
Defendants

CIVIL ACTION
No. N.-82-3152

The above entitled case came on for trial before His Honor, Edward S. Northrop, on December 9th, 1983 at 10:00 a.m., at Baltimore, Maryland.

. . . . . .

[674] give and so forth and so on. So I think that we will do now is let you go until 1:30, have your lunch and come back again and we will proceed.

(Thereupon, the following proceedings were held in open court out of the presence and hearing of the jury).

THE COURT: Come in about one o'clock into chambers or come in here and we will go over the instructions and then we will have — how long do you intend to talk two minutes?

MR. BALDWIN: Your Honor, I want for the record to note that I finished at 11:25. I am not going to be more than 30.

MR. SHADYAC, SR.: I would like to reserve 45 minutes for opening and closing if, Your Honor, please.

THE COURT: What I was thinking about is this, if we get going with the instructions the only thing we have is excessive force and the 1983 and assault and battery and negligence. On the negligence counts there isn't too much is there?

MR. BALDWIN: Your Honor, we renew our motion for directed verdict on the negligence. I think it is a source of confusion if they come back on the negligence. We are going to move for a JNOV and as police officers they have a qualified immunity at law, Harlow v. Fitzgerald.

THE COURT. They do have that.

[675] MR. SHADYAC, SR.: It was not alleged as an affirmative defense.

MR. BALDWIN: Malice has to be shown, good faith has been our defense and there cannot be negligence under those circumstances.

MR. SHADYAC, SR.: Good faith is alleged but immunity is not alleged and it is a —

MR. BALDWIN: As a matter of law.

THE COURT: Let me think about it and then we will talk about it when we get back together again. But the only thing we do have is the 1983 excessive force claim.

MR. SHADYAC, SR.: Could I, if Your Honor please, ask the Court under the circumstances especially in view of Your Honor's ruling and I wrote it down about the exigent circumstances in view of all of the evidence that has now been presented as to the police conduct, as of that time I think the evidence is absolutely clear that only one officer, none of the others, only one officer had any knowledge whatsoever of any other activities of the deceased. That was Dodson. He had an outstanding A and B misdemeanor warrant, period.

If Your Honor please, there has been no corroboration, there has been no evidence presented in this case of any exposure, there has been absolutely none and this occurred to a police lieutenant's wife and children. I can't

. . . . . .

[690] reliance is honest in its intention and reasonable.

MR. SHADYAC, SR.: Your Honor, I would object to the standard operating procedures. There has been no evidence of standard operating procedures of Anne Arundel County.

THE COURT: Yes they were. The expert testified and they were in, they were brought out in other matters by the testimony. All right. Assault and battery. You may note your exception.

MR. SHADYAC, SR.: Note my exception.

THE COURT: It has always been the policy of the law to protect the physical integrity of every person from all unnecessary and unwarranted violation or interference.

Any intentional attempt or threat to inflict injury upon the person of another, when coupled with an apparent present ability to do so, and an intentional display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes an assault.

An assault may be committed without ultimately touching or striking or doing bodily harm to the person of another. Any

intentional use of force upon the person of another is a battery. So the least intentional touching of the person, if accompanied by an intentional use or display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes a battery. This

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[695] himself of the defense until he has proved that he had a good-faith belief in the legality of what he did. A defendant is not immune from liability for damages under 1983, if he knew or reasonably should have known the action he took within the sphere of official responsibility would violate the constitutional rights of the person affected. The defendant must prove that he believed, in good faith, that his conduct was lawful, and that his belief itself was reasonable.

MR. SHADYAC, SR.: Objection, Your Honor, to immunity.

MR. BALDWIN: Your Honor, we take exception to the instructions relating to negligence and the subsequent ones as being unnecessary.

THE COURT: Well, I think it is confusing counsel. There is no doubt about it and I think he is entitled to good faith immunity but if you want to leave it in leave it in.

MR. BALDWIN: It seems in a prior motion we had cited Duncan v. Kustanich (phonetic), 260 Maryland 298 which indicates that a sovereign immunity to the extent that a public official is acting in a discretionary capacity and is not involved in a malicious act is immune, so that the only way the qualified immunity could be waived is if the person acts in a maliciously —

THE COURT: Well, I am going to get to that. A [696] defendant is not entitled to good faith defense if he acted with malicious intent to violate the plaintiffs' constitutional rights or caused other injury to the plaintiff or if the defendant knew or should have known that his action would violate the plaintiffs' constitutional rights.

MR. BALDWIN: Doesn't that vitiate a negligence count?

THE COURT: I don't think so. You can have it both ways. It's confusing, very confusing, let me put it that way. I will agree with you on that, but I think that if he wants it it has to be granted.

MR. BALDWIN: We take exception, Your Honor.

THE COURT: Sure, I don't blame you. I am going to instruct you with respect to the matter of damages. I wish to caution you that damages are not to be considered in any way in determining whether or not the defendant was liable. Damages are to be considered only if you reach a verdict in favor of the plaintiff. And the plaintiffs in this instance of course are Mr. and Mrs. Vizbaras and they are suing on behalf of the estate of their deceased son.

So therefore, in determining what damages you are to give them for the injuries suffered by Peter Vizbaras to his estate, you must take into consideration those damages and the uncertain determination the law imposes upon you. The duty of the jury of determining fairly and truly what

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[702] THE COURT: Do you want about five minutes?

MR. SHADYAC, SR.: Yes, sir, Your Honor.

(Recess)

(Thereupon, the closing arguments of counsel were given and recorded but are not herein transcribed.)

THE COURT: Ladies and gentlemen of the jury, it now becomes the responsibility of the Court to instruct you as to the law —

MR. SHADYAC, SR.: The microphone is not on.

THE COURT: There we go.

It now becomes the responsibility of the Court to instruct you as to the law which will govern you in reaching your verdict

in this case. And of course it is your responsibility to accept the law as it is outlined to you by the Court.

It seems to me that most of what I am going to say is just common sense. At least we try to fool ourselves in considering the law and what we say to you is common sense and I hope it comes out that way as I outline it to you. You and I have very definite and distinct functions to perform.

It is my duty among others to preside at the trial to rule on questions that arose during the course of the trial. Some of those rulings were made in your hearing or on some occasions some were made outside your hearing here at the bench. You should not permit those rulings to influence [703] you in your determination except when I excluded any testimony then of course you should not give any further consideration of the testimony that was stricken from the record. Any reference that I may make to the evidence in the case is not binding upon you if it differs from your recollection of the evidence in the case. Because it is your recollection and your recollection alone which should guide you in reaching your verdict in this case.

Also, I must point out to you the opening and closing arguments of the attorneys do not constitute evidence in the case. Nor is counsel's recollection of the evidence binding upon you because again it is your recollection of the evidence which must guide you in reaching your verdict in this case.

Your responsibility in all cases and this case is a serious one. You are called upon to reach a verdict. Our English word verdict results from a combination of two latin words, veritas meaning truth and dicto, the Latin verb meaning to speak. So your responsibility literally is to determine the truth as to the rights and obligations of these parties as they have been established by the evidence and as that evidence is controlled by the law as outlined to you by the court.

Now the burden of proof rests upon the party advancing a claim or defense. I may express it by saying [704] that the burden of proof rests on that party that wants you to go along with him, whether it be by the way of claim or whether it be by way of defense. When a party says this is what I want you to find then the burden of proving the facts necessary for that conclusion rests on that party.

Now this is a civil case and the burden I am talking about is not the burden of proof beyond a reasonable doubt but the burden to prove by a fair preponderance of evidence, that is the greater weight of the evidence, essentially it means that the evidence satisfies your mind as to the existence or non-existence of the particular fact you are considering. It is simply the more convincing evidence which is not necessarily determined by the number of witnesses or by the number of exhibits. A common method of illustrating the point is by use of the well-known symbols of the scales of justice evenly balanced. In your mind if you can imagine a scale used by a druggist used to accurately weigh, consisting of two trays or pans suspended at the end of the beam in equal balance.

On one end place all the evidence in the case which favors the existence of the particular fact which you are considering. Place in the other tray all the evidence in the case which favors the non-existence of the fact you are considering, in each case giving to that evidence such weight as in your judgment it is fairly entitled to receive. The [705] tray carrying the evidence as to the existence of the particular fact you are considering goes down, that is if this evidence outweighs the evidence of the non-existence of the fact, then the fact has been established by a fair preponderance of the evidence. If on the other hand the scale remains in even balance or if the tray containing the evidence as to the non-existence of the particular fact goes down, then the burden of proof as to the existence of that fact has not been proven by a fair preponderance of the evidence.

If in these instructions any rule, direction, or idea be stated in varying ways, no emphasis thereon is intended by me and none must be inferred by you. For that reason you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions and as a whole, and regard each in the light of all of the others.

You are the sole judges of the issues of fact in this case. That is your responsibility and you will reach your judgment based solely upon the evidence which you heard from the witness stand upon the exhibits which were received in evidence and the inferences which are reasonably deducible from the evidence and the exhibits.

In your consideration of the evidence you are not limited to the bald statements of the witnesses. In other [706] words, you are not limited to what you see and hear as the witnesses testify. On the contrary, you are permitted to draw from facts which you find to have been proved such reasonable inferences as seem justified in the light of your own experience and your own common sense.

In determining the issues of facts submitted to you you will consider and weigh the testimony of all the witnesses who have testified at this trial. All the documentation that has been in evidence as well as all the circumstances concerning which testimony has been given.

You are the sole judges of the credibility of the witnesses. It is for you to decide whether to believe any witness and the extent to which any witness should be credited. In determining whether to believe the testimony of any witness and in weighing the testimony of any witness you may consider the behavior of that witness on the witness stand; the witness' manner of testifying; whether the witness impressed you as a truth-telling individual; whether the witness impressed you as having an accurate recollection; whether the witness had an opportunity

for observing the details concerning which that witness testified; whether the witness made any contradictory statements; whether the witness had any motive for not telling the truth and you may also consider the interest of the witness, if any, in the outcome of the case and in determining what weight to attach [707] to that testimony of any witness.

If you find that any witness deliberately testified falsely as to any material or important fact concerning what that witness could not reasonably have been mistaken, then you may, if you see fit, disregard the entire testimony of such a witness.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently, and innocent misrecollection, like failure of recollection is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment you will give the testimony of each witness such weight, if any, you may think it deserves.

When I use the word witness I mean to the parties as well.

In determining the issues presented, you should consider all the evidence bearing upon that issue, regardless of who produces the evidence. A party is entitled to the same benefit from the evidence that favors him when that [708] evidence is produced by his adversary as when it is produced by himself.

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. A so-called expert witness is an exception to this rule.

A witness who by education and experience has become an expert in any art, science, profession, or calling, may be permitted to state his opinion as to matters in which he is versed

and which is material to this case. He may also state his reasons for such opinions.

Now in a case such as this one we have of course the testimony of expert witnesses. You should consider such expert opinion received in evidence in this case and give it such weight as you think it deserves. You may reject it entirely if you conclude that the reasons given in support of the opinion are unsound. If you find that the facts upon which a particular expert relied are not sufficient to support the opinion or that the facts relied upon are erroneous, you may reject that opinion.

The law of the United States permits the judge to comment to you on the evidence in this case. Such comments are only expressions of the judge's opinion as to the facts and you may disregard them entirely since you are the jurors who are the sole judges of the facts and when I do comment I will tell you so.

[709] There are generally speaking two types of evidence from which you may properly find the truth of the facts of the case. One is direct evidence such as the testimony of an eyewitness, and I am commenting, you will remember in this case there were a number of eyewitnesses and there may be certain discrepancies, and I told you how to judge those when I talked to you about credibility just a few minutes ago. But there are an unusual number of eyewitnesses in this case and as I told you then before that each human being sees things maybe differently from the other, but that's what you have to judge in your determination of what happened there. The other is indirect or circumstantial evidence, the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

The law makes no distinction between direct and circumstantial evidence but simply requires that you find the facts in accordance with the preponderance of all of the evidence in the case, both direct and circumstantial, and I told you how to make a judgment as to that as to the scales.

You are instructed that you may not guess or speculate as to the existence of any fact in this case. You must base your findings solely upon the evidence that has been adduced before you and upon any inferences reasonably deducible therefrom.

It is the duty of the attorneys on each side of [710] the case to object when the other side offers testimony, or other evidence, which the attorney believes is not properly admissible. You should draw no inference against either side as a result of these objections, nor should they affect your assessment of the evidence.

I have directed a verdict in favor of the defendants on the issue of illegal entry into the Vizbaras home and illegal arrest of Peter Vizbaras. Thus, you are to take as a matter of law the fact that the police were lawfully in the Vizbaras home and the police were proper in their attempt to arrest Peter Vizbaras. This is because I have found as a matter of law that the Vizbarases voluntarily consented to the entry of the police in their home and moreover I found that the police believed that there was probable cause to arrest Peter, and that exigent circumstances existed to do so without a warrant, because of the fact that as the Maryland law puts it, there was evidence and it was uncontroverted that he was destroying property at least in the person of Mr. Einberg, apparently was, he thought at least, and testified here and it was undisputed was in danger of it.

Thus, your task is only to decide the issues in accordance with the Court's instructions of excessive force. That's what you've got to find. That there was excessive force or not, assault and battery and negligence and I am [711] going to get to those right now.

In order to prove their claims the burden is upon the plaintiff to establish by a preponderance of the evidence in this case the following facts: that the defendants knowingly and intentionally beat the decedent about the body and it resulted in his

positional asphyxiation, and you heard about that, his being on the ground.

Second, the defendants then and there acted under color of some law of the state of or ordinance, or regulation of the county.

The defendants' acts and conduct deprived Peter Vizbaras of his federal constitutional rights which was not to be denied or deprived or should have not deprived him of his liberty and life without due process of law as that phrase is defined and explained in these instructions and I will get to that in a minute.

Fourth, the defendants' acts and conduct were the proximate cause of injuries and consequent damages to the plaintiff.

However, as my instructions will later indicate, the police are justified in using reasonable force to subdue and arrest a person or a suspect.

This is a civil rights action and it is in this Federal Court by virtue of the provisions of 1983, Title 42 of the United States Code. The plaintiffs, Vincent and Linda [712] Vizbaras, on behalf of the estate of Peter claimed damages for injuries alleged to have been suffered by their son, Peter, as a result of his having been deprived under color of the law of the State of Maryland certain rights, privileges or immunities secured to him by the Constitution of the United States.

Section 1983, Title 42 U.S. Code provides that an inhabitant of this Federal District in the Federal District of the whole State of Maryland may seek redress in this Federal Court by way of damages against any person or persons who under color of any state law under the State of Maryland or county causes such inhabitants to be subjected to the deprivation of any rights, privileges or immunity secured or protected by the Constitution of the United States.

Section 1983 just outlined to you by me is one of the Civil Rights Acts enacted by Congress under the 14th Amendment to the Constitution of the United States and was enacted in 1871.

The 14th Amendment to the Constitution provides that, in part: "No state shall make or enforce any law which shall abridge the privilege or immunities of the citizens of the United States nor shall any state deprive any person of life, liberty or property without due process of law or deny to any person within its jurisdiction the equal protection of the laws."
[713] Due process of law means among other things that no one can be punished until he has been convicted and sentenced by a court with authority to act in his case. In other words, the police officers do not have authority to punish a person in the process of arresting him for commission of a crime even if he observed the person committing that crime.

A police officer does not have the authority to punish a person for the crime for which he is being arrested. Punishment can only be lawful if it is based on the sentence of that court following a judgment of guilty, and physical force upon a person can only be used in self-defense to prevent an escape, to prevent serious injury to persons or property, to quell a riot or serious disturbance, or to control an unruly suspect or arrested person who refused to obey a lawful order. To be deprived of liberty without due process of law means to be deprived of liberty without authority of the law.

Before you can determine then whether or not the deceased was deprived by the defendants of any of his liberties under the Federal Constitution without due process of law, you must first determine from the preponderance of the evidence in this case whether the defendants knowingly did the acts alleged and if so whether under the circumstances as shown by the evidence in this case the [714] defendants acted within or without the bounds of their lawful authority under state law.

Acts are done under color of state law not only when acts of the employees such as in this case, the Anne Arundel County police officers are authorized by Maryland law, but also when the acts are wholly unauthorized and in fact illegal under Mary-

land law. However, in such a latter case, the unlawful act in order to be done under color of the state law must be done while the employee of the Anne Arundel County Police Department is purporting or pretending to act in performance of his official duty; that is to say, the unlawful act must consist of abuse or misuse of power which is possessed by the police employee only because he is such an employee and the unlawful act must be of such a character and be committed under such circumstances that it would not have occurred, but for the fact that the person committing it was a police employee exercising his official powers outside the bounds of his lawful authority.

Now the evidence of this case is that all the defendants were at all times relevant acting under color of state law. Accordingly, you are instructed that any and all acts if any that you find were committed by the defendants during that time involved in this case and which are the subject of the plaintiffs' claims were done under color of state law and thus fitting under the 1983 statute that I [715] outlined to you.

The mere fact that the evidence in the case may establish physical contact between the defendants and the deceased which resulted in serious personal injury or death of the deceased is not proof that the defendants acted beyond their lawful authority under the Maryland law. The defendants have the lawful authority, indeed the lawful duty under the Maryland law to use such physical force that may have been reasonably necessary to prevent escape; to enforce compliance with their proper instructions and in order to — in order to effect a lawful arrest.

So even though you should find from the preponderance of the evidence in this case that the acts alleged by the plaintiffs and they are the parents of course, but referring to the acts against Peter Vizbaras were in fact knowingly done by the defendants. If you also find that they were done for any one or more of the lawful purposes just enumerated, such conduct

of the defendants was within the bounds of their authority under Maryland law and was therefore lawful, unless you further find from the preponderance of the evidence in this case that the defendants used greater force or means on Peter Vizbaras that would have appeared to a reasonable person under like circumstances to be necessary in order to accomplish the lawful purposes intended.

[716] If you find from a preponderance of evidence in this case the defendants acted beyond the bounds of their lawful authority under Maryland law at the time and place alleged, then you must find that the defendants did without due process deprive the deceased of his life, or liberty, secured and protected to him under the laws of the Constitution and the laws of the United States since the Maryland law applicable in this case is equivalent to the due process requirements of the Federal Constitution and you will return a verdict for the plaintiffs.

If you should find from a preponderance of the evidence on the other hand in this case the defendants used more or greater force or means on the decedent, Peter Vizbaras, than would have appeared to a reasonable person in like circumstances to be necessary in order to accomplish any lawful purpose or purposes intended, then you must find the defendants acted unlawfully, contrary to the law of the State of Maryland and you will return a verdict for the plaintiffs.

If, however, you find from a preponderance of the evidence in this case that the defendants acted within the bounds of their lawful authority, under the state law at the time and place alleged, then you should return a verdict in favor of the defendants. For as previously stated, unless the defendants acted outside the limits of their lawful authority under state law, the defendants did not deprive the [717] plaintiff of any life or liberty without due process and you will return a verdict for the defendants.

If you find in this case, the defendants in this case used force against the body of the plaintiff then you must decide

whether the use of that force was reasonable and necessary under the circumstances. The use of force which was unreasonable and not necessary under the circumstances would constitute excessive use of force and would deprive the plaintiff of his constitutional rights.

You should consider in addressing this question the need for the application of force. The relationship between the need and the amount of force that was used. The extent of any physical injury which you find to have been inflicted and whether the force was applied in a good faith effort to subdue the person arrested or whether it was maliciously, wantonly and oppressively done for the purpose of inflicting injury.

The defendants in this case may avail themselves of the defense of good faith. Police officers as officers of a state have a realistic good faith belief in their action, and the reasonableness of their action, if at the time of the incident, they believe their conduct to be constitutionally permissible and that such belief is reasonable. Police officers also have a good faith reliance on standard operating procedures, if at the time of the incident they [718] relied on the standard operating procedures of their institution when responding to an incident and when such reliance is honest and in its intention and reasonable.

And also as I told you at the very beginning the assault and battery in this case. It has always been the policy of the law to protect the physical integrity of every person from all unnecessary and unwarranted violation or interference.

Any intentional attempt or threat to inflict injury upon a person of another, when coupled with an apparent present ability to do so and an intentional display of force that would give the victim reason to fear or expect immediate bodily harm, constitutes an assault. An assault may be committed without actually touching or striking or doing bodily harm to the person of another.

Any intentional use of force upon the person of another is a battery. So the least intentional touching of a person accompanied by intentional use of display of force such as would give the victim reason to fear or expect immediate bodily harm, constitutes a battery.

This intentional force required for a battery must be unlawful. Unlawful means either contrary to the law or without legal justification and here you've got the same thing as you had with the 1983. Therefore, in order for the defendants to be liable they must have used force not either lawful or justifiable. And they have must have intent. And I am going to define intent for you.

Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operation of the human mind. But you may infer intent from surrounding circumstances. You may consider any statement made or act done or omitted by a party whose intent is in issue and all other facts and circumstances which indicate his state of mind. You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is for you to decide the facts that have been established by the evidence.

Now as I told you at the beginning there is a negligence count. Negligence is the doing of some act which a reasonably prudent person would not do or the failure to do something which a reasonably prudent person would do when prompted by considerations which ordinarily regulate the conduct of human affairs. It is in other words a failure to use ordinary care under the circumstances in the management of one's person or property or of agencies under his control.

Now in negligence you must have proximate cause. The proximate cause of an injury is that cause which in natural and continual sequence unbroken by any intervening cause produces injury and without which the result would not [720] have occurred.

Restating this technical, legal definition in simpler phraseology, a proximate cause of an injury is some act or omission which causes or contributes to cause injury, and without which the injury would not have been sustained.

In other words if the plaintiffs' injury would not have occurred but the defendants' negligence, then the defendants' negligence is the proximate cause of the injury. The defendants' negligence need not be the sole cause. Several causes may concur to produce an injury. In that event each cause is a proximate cause of the injury.

Now also to negligence is what might be called contributory negligence. And this is a little hard concept, both the negligence and the contributory negligence is applied to this case and I told counsel that. But I assume in this case, and I am merely making a comment now, that the contributory negligence if there is any that you find would negate the finding of negligence would have been the resistance of Peter to the arrest that was made under the circumstances. And of course excessive force is charged here by the plaintiff and the negligence there would have been the use of excessive force under the circumstances to accomplish what they set out to do.

The defendant raises the defense of contributory negligence, so I must now explain to you what is meant by [721] that phrase and how it operates. Contributory negligence is negligence of a party who has sustained damages which combining in some degree with the negligence of another helps in proximately causing the damage of which the former complains. Of course in this instance the parents are complaining of the death of Peter.

One who is guilty of contributory negligence may not recover from another for the damages suffered. In other words the defense of contributory negligence is a defense if it is established to any charge or negligence. The reason for this rule is not that the fault of one justifies the fault of the other, but simply

there can be no apportionment of blame and damages among the participating agents of causation.

Contributory negligence as it has been defined connotes negligence on the part of both the plaintiff and the defendant combining to proximately cause the injury. Not only is the plaintiff precluded from recovery if he is guilty of contributory negligence but the plaintiff may not recover if the damages were proximately caused by his own sole negligence.

You are instructed that the contributory negligence however is an affirmative defense, and the burden in this case is upon the defendant to prove by a preponderance of the evidence not only that the plaintiff was [722] negligent but also must prove that such negligence was a contributory or proximate cause of the accident. If there is a failure in that respect either one of these respects cannot maintain this charge of contributory negligence. Of course, evidence on behalf of the plaintiff as well as on behalf of the defendant may be considered in connection with this instruction.

Now in connection with negligence the defendants may be entitled to qualified immunity from damages if they acted in good faith. Whether the defendants can successfully assert a qualified immunity defense depends upon the circumstances and motivations of their actions as established by the evidence at this trial. Defendants who are asserting a qualified immunity defense has the burden of proving through the evidence that they acted in good faith.

A defendant may not avail himself of the defense until he has proved that he has a good faith belief in the legality of what he did. The defendant is not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the action he took within the sphere of official responsibility would violate the constitutional rights of the person affected. The defendant must prove that he believed in good faith that his conduct was lawful, and that his belief itself was reasonable.

The defendant is not entitled to good faith [723] defense if he acted with malicious intent to violate the plaintiff's constitutional right or cause other injury to the plaintiff or if the defendant knew or should have known that his action would violate the plaintiff's constitutional rights.

Now I am going to instruct you with respect to the matter of damages in this case. However, I wish to caution you that damages are not to be considered in any way in determining whether or not the defendant was liable.

Damages are to be considered if and only if you reach a verdict in favor of the plaintiff. If you reach a verdict in favor of the defendants there are no damages. You come in with a verdict for the defendants in that case.

You are instructed if you find for the plaintiffs, then in determining what damages you are to give them for the injuries, if any, and this is for Peter Vizbaras as I will tell you in a moment. You must take into consideration the damages are in their nature somewhat uncertain of determination, that the law imposes upon the jury the duty of endeavoring to determine fairly and truly what amount of money will compensate each injured person, and that is not necessary for any witness to have expressed an opinion as to the amount.

In assessing damages for personal injuries, if any are assessed, you may award damages in such sum as in your [724] judgment will fairly and reasonably compensate Peter, in connection with Peter, for his pain and suffering before he died, you may award the amount of the funeral expenses which in this case I think the only recovery they are entitled to is $2,000, is that it? Under the law of Maryland or you may use it as a yardstick. And I think it was agreed to that it was $3,750, was it?

MR. SHADYAC, SR.: We do not agree that the $2,000 applies if Your Honor please. This is a federal matter and the state law does not allow.

THE COURT: I guess you're right. Under the circumstances it was $3,750. Then the other thing is that for his loss of life, whatever that is. And that would be the measure of damages you would consider. While the amount of the verdict is left to your sound discretion your award must be just and reasonable. It must be based upon the evidence introduced. You don't have any except just as I told you. Pain and suffering, loss of life, funeral expenses. Mental anguish, and humiliation. But it cannot be arbitrary or anything like that. Do not award speculative damages and if your award is for damages it should be against the whole group of people, not single out any individual or anything like that in this particular instance in this case.

Now I'm going to instruct you as to punitive damages. In addition to the actual damages the law permits [725] you to, under certain circumstances, to award the injured person punitive and exemplary damages in order to punish the wrongdoer for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct. If you should find from the preponderance of the evidence in this case that the plaintiffs are entitled to a verdict for actual or compensatory damages and should further find that the act or omission of the defendants which proximately caused the injuries or damages to the plaintiff, was maliciously or wantonly or oppressively done, then you may if in the exercise of discretion unanimously choose so to do, add to the award of actual damages such amount as you think, as you shall unanimously agree to be proper as punitive damage or exemplary damages.

An act or failure to act is maliciously done if prompted or accompanied by ill-will or spite or grudge either toward the injured person, in this case Peter Vizbaras, individually, or to all persons in one or more groups or categories of which the injured person is a member.

An act or failure to act is wantonly done if done in reckless or callous disregard of or indifference to the rights of one or more persons including the injured person.

An act or failure to act is oppressively done if done in a way or manner which injuries or damages or otherwise violates the rights of another person with [726] unnecessary harshness or severe as by misuse or abuse of authority or power or by taken advantage of some weakness or disability or misfortune of another person.

Whether or not to make any award of punitive or exemplary damages in addition to actual damages is a matter exclusively within your providence. If you should unanimously find from a preponderance of the evidence in this case that the defendants' act or omission which proximately caused actual damage to the plaintiff was maliciously, wantonly or oppressively done; but you should also bear in mind in this case if you find this that such extraordinary damages may be allowed only if you should first unanimously award the plaintiff a verdict for actual or compensatory damages; you cannot find it unless you have compensatory damages. And you should also bear in mind not only the conditions under which, and the purposes for which the law permits an award of punitive and exemplary damages to be made, but also the requirement of law or the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount because of any sympathy or bias in favor of any of the parties.

Now you must weigh and consider this case without regard to sympathy, prejudice or passion for or against either party to this action.

[727] You are instructed that your attitude and conduct as jurors at the outset of the deliberations is a matter of considerable importance. It is not discreet for a juror upon entering the jury room to voice an emphatic expression of his opinion

on the case or to announce his determination to stand for a certain verdict. When one does that at the outset his sense of pride may cause him to hesitate to recede from an announced position, if and when shown, that it is wrong. Remember that you are not partisans or advocates in this matter but are judges. The final test of the quality of your service will lie in the verdict which you return to this courtroom, not in the opinions any of you may hold before an agreement on the verdict. Bear in mind that you will make a definite contribution to the efficient judicial administration, if you arrive at a just and proper verdict in this case. For that end, the Court reminds you that in your deliberations in the jury room your purpose should not be to support your own opinion but to ascertain and declare the truth.

Probably you already know your verdict must be unanimous reflecting the judgment of each and everyone of you. You should approach the issues of this case as men and women of affairs in the same manner which you approach any important matter that you have occasion to determine in the course of your everyday business. Consider it in the jury [728] room deliberately and carefully, in the light of the instructions which I have given you and use the same common sense and in the same intelligence that you would employ in determining any important matter that you have to decide in the course of your own affairs. You are not to allow sympathy or prejudice in any way to affect your judgment in this case.

When you return to the courtroom the clerk will ask who shall speak for you and you shall say our foreman, Mr. DePauldie (phonetic). Mr. DiPauldie will rise and give the verdict under the circumstances. And remember also that if you have to communicate with the Court in any way send a note by, to the bailiff, give a note to the bailiff who will be sworn in in a few minutes and he will bring the note to the Court under the circumstances. All right, gentlemen, you may approach the bench.

One other thing if you need the tape I guess we are going to have to get you back in this room and play it for you.

MR. BALDWIN: Your Honor, the gentleman who can run it can go in and play it and then he can leave.

THE COURT: Don't you think they better come back in here and listen to it. I hope you don't need to. If you do, that's what we'll have to do.

(Thereupon, the following proceedings were held at [729] the bench out of the presence and hearing of the jury.)

THE COURT: What exceptions do you have?

MR. SHADYAC, SR.: Just the exceptions we made on the record before, Your Honor.

THE COURT: Note the exceptions that were noted heretofore, okay.

MR. BALDWIN: Same exceptions made beforehand, Your Honor.

One additional thing, I am not asking this as an additional instruction. If it is clear to Mr. Shadyac, it is fine, but in listening to the instructions I am not sure that it is clear that there is no recovery for the parents.

THE COURT: I will tell them that.

(Thereupon, the following proceedings were had in open court in the presence and hearing of the jury.)

THE COURT: The counsel has advised me and it is right that the recovery here is for the estate of Peter Vizbaras, no recovery for the parents as such, okay. All right.

MR. SHADYAC, SR.: How about the missing witnesses' instruction?

THE COURT: What remark didn't you hear?

A JUROR: Your last remark.

THE COURT: Which was it?

MR. SHADYAC, SR.: The recovery only to the [730] estate.

THE COURT: I said the recovery as to the parents for Peter Vizbaras. They don't get anything except for his estate so to

speak, and that considers their pain and suffering, humiliation and mental anguish and funeral expenses. And punitive damages if you find that and I think I have given you all that.